Calendar No. 822

101ST CONGRESS *2d Session*	SENATE	REPORT 101-461

FAIR LENDING ENFORCEMENT ACT OF 1990

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 3049

SEPTEMBER 13 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

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Mr. RIEGLE, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

[To accompany S. 3049]

INTRODUCTION

The Senate Committee on Banking, Housing, and Urban Affairs marked up and ordered to be reported S. 3049, the Fair Lending Enforcement Act of 1990. The bill amends the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Federal Deposit Insurance Act, and the Federal Credit Union Act in order to improve enforcement of the fair lending laws and to remedy discrimination in home mortgage lending. The Committee voted to adopt the legislation by a voice vote, without objection, and to report the bill to the Senate.

PURPOSE AND SUMMARY

The Fair Lending Enforcement Act addresses the disturbing evidence suggesting discrimination against racial minorities and minority neighborhoods in home mortgage lending by improving enforcement procedures in various ways. The legislation is designed to cause the federal depository institution regulatory agencies to monitor more closely and to respond more forcefully to patterns of lending which suggest discrimination and to individual complaints of discrimination. The legislation will also enhance the ability of individuals to pursue their rights under fair lending laws by requiring lenders to make appraisal reports available to loan applicants and by requiring the regulatory agencies to inform victims of discrimination that they may have certain rights. It is also designed to enable the Department of Justice and the Department of Housing and Urban Development (HUD) to play a greater role in

enforcing fair lending laws. Finally, the law tailors the small mortgage banker exemption in the Home Mortgage Disclosure Act to the mortgage banking industry. It is expected that the legislation will also have a salutary effect on compliance with other consumer and community reinvestment laws.

HISTORY OF THE LEGISLATION

The Subcommittee on Consumer and Regulatory Affairs held two hearings on the subject of dicrimination in home mortgage lending. The concepts embodied in the legislation were developed at these hearings.

The witnesses at the initial October 24, 1989 Subcommittee hearing were: John P. LaWare, Member of the Board of Governors of the Federal Reserve System; C. Austin Fitts, Assistant Secretary for Housing and Federal Housing Commissioner, Department of Housing and Urban Development (HUD); Jonathan Fiechter, Senior Deputy Director for Supervision Policy, Office of Thrift Supervision (OTS); Robert J. Hermann, Senior Deputy Comptroller for Bank Supervision Policy, Office of the Comptroller of the Currency (OCC); John F. Bovenzi, Deputy to the Chairman, Federal Deposit Insurance Corporation (FDIC); Allen Fishbein, General Counsel, Center for Community Change; Arthur L. Johnson and Bernard Parker, Jr., Co-Chairs, Ad Hoc Coalition on Fair Banking Practices in Detroit; Shanna L. Smith, Representative, National Fair Housing Alliance, Inc.; Wade J. Henderson and Stephen M. Dane, Representatives, Leadership Conference on Civil Rights. Testimony was submitted for the record by the Cuyahoga Plan of Ohio, Inc., and the National Puerto Rican Coalition, Inc.

At the initial hearing the federal regulatory agencies and HUD submitted their reports to Congress on Statistical evidence of discrimination and recommendations for action, as required by Section 1220 of the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[1] The regulatory agencies generally testified that they found very few to no violations of anti-discrimination laws in their examination procedures, even though press reports and statistical studies have strongly suggested discrimination in many cities across the country. The community group/civil rights witnesses testified that the federal regulatory agencies "are either unable or unwilling to use the full scope of their supervisory powers to address the problem of mortgage lending discrimination.[2] They also cited studies showing the disparities in levels of lending between comparable minority and non-minority neighborhoods and disparities in rejection rates between minority and non-minority loan applicants.

The Subcommittee held a follow-up hearing on May 16, 1990. The witnesses were: John P. LaWare, Member of the Board of Governors of the Federal Reserve System; Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Depart-

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[1] Financial Institution Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1811.

[2] Discrimination in Home Mortgage Lending: Oversight Hearing Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. 479 (Oct. 1989) (statement of Allen Fishbein, General Counsel, Center for Community Change) [hereinafer cited as "1989 Hearing"].

ment of Housing and Urban Development; Robert J. Hermann, Senior Deputy Comptroller for Bank Supervision Policy, Office of the Comptroller of the Currency; John F. Bovenzi, Deputy to the Chairman, Federal Deposit Insurance Corporation; Jerauld C. Kluckman, Director of Compliance Programs, Office of Thrift Supervision; Michelle C. White, Housing Specialist, Western Center on Law and Poverty; Shanna L. Smith, Representative, National Fair Housing Alliance, Inc.; Allen Fishbein, General Counsel, Center for Community Change; Calvin Bradford, Representative, Chicago Fair Housing Alliance.

Each of the regulatory agencies, except for the OCC, reported on some new initiative(s) it had taken over the preceding six months. For example, the FDIC had begun establishing a separate consumer compliance examiner program. The regulatory agencies also reported on their efforts to improve the training of consumer examiners, particularly with regard to Community Reinvestment Act (CRA) examination techniques in order to enhance uniformity. The community group/civil rights witnesses testified about legislative or regulatory recommendations for eliminating mortgage discrimination and their experience with testers programs. They also testified that the regulators' enforcement efforts over the past six months had shown little improvement and that the regulators' examination procedures were inadequate in both detecting and addressing discrimination. The Subcommittee also found evidence that responses to consumer complaints, particularly for the OCC, may be inadequate and that low appraisals reflecting prejudice against minority neighborhoods may be part of the problem.

On the basis of hearings, discussions, and investigations of the Subcommittee on Consumer and Regulatory Affairs, the Fair Lending Enforcement Act of 1990 was drafted. On June 22, 1990, Senator Alan Dixon circulated a committee print of the bill. On July 17, 1990, the Senate Banking Committee marked up the committee print. Senator Bond offered one amendment which was accepted by voice vote without objection. The Committee then voted to adopt the legislation by voice vote, without objection, and to report the bill to the Senate. On September 13, 1990, Senator Dixon, Chairman of the Subcommittee on Consumer and Regulatory Affairs, introduced the bill and Chairman Riegle reported the bill (S. 3049) on the same day.

BACKGROUND

A. Fair lending laws

Two overlapping statutes specifically make discrimination in mortgage lending illegal: the Fair Housing Act (FHA) [3] and the Equal Credit Opportunity Act (ECOA).[4] In addition, the Civil Rights Acts of 1866 and 1870 [5] have also been interpreted to bar racial discrimination in lending.

ECOA, enacted in 1974, prohibits discrimination against an applicant for credit because of race, color, religion, national origin, sex,

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[3] Fair Housing Act of 1968, 42 U.S.C. § 3605 (amended 1988).
[4] Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974) (amended 1976 and 1980).
[5] Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981, 1982, and 1983.

marital status, age, receipt of public assistance, or efforts to exercise consumer rights. The law requires notification of a denial of credit in writing, with the reason specified if the consumer so requests. An aggrieved applicant may sue for actual damages plus $10,000 in punitive damages and attorney's fees. The various federal financial regulatory agencies, along with the Federal Trade Commission and several other independent agencies, enforce ECOA. Under current law, the Justice Department may bring a civil enforcement action whenever it has reason to believe a creditor has engaged in a pattern or practice of violating ECOA or whenever another government agency refers an enforcement matter because it has been unable to obtain compliance.

ECOA regulations [6] require creditors to collect information about the applicant's race and gender and to maintain credit files for 25 months. Discouraging applications on a prohibited basis and advertising which implies a discriminatory preference are also prohibited. Additionally, creditors are barred from considering information which is discriminatory in effect unless there is a statistically valid relationship between the criteria and creditworthiness.

FHA is Title VIII of the Civil Rights Act of 1968. It prohibits discrimination on the basis of race, color, religion, national origin, sex, familial status or handicap in the financing, sale, or rental of housing. HUD has primary responsibility for administering FHA. An aggrieved person may sue directly or may use HUD's complaint procedure. HUD may itself initiate complaints. The Attorney General is also authorized to enforce discriminatory "pattern and practice" cases.

FHA was amended in 1988 to facilitate tougher enforcement. By regulation and/or case law, FHA has been imterpreted to prohibit racial redlining, low appraisals of property based on racial considerations, and portraying a racially exclusive image in advertising.[7] FHA requires the federal financial regulators to "administer their programs and activities . . . in a manner affirmatively to further the purposes of [the statute] and [to] cooperate with the Secretary [of HUD] to further such purposes." [8]

B. Loan discrimination studies and testimony

The Atlanta Journal Constitution published a comprehensive, Pulitzer prize-winning series in May 1988.[9] Its analysis of data obtained from the Federal Home Loan Bank Board and other sources showed that middle income white neighborhoods received five times as many loans from thrifts as middle income black neighborhoods, and economic factors could not explain this difference. A follow-up article in January 1989 [10] reported that black applicants for thrift mortgages were rejected more than twice as often as whites nationally, and more than three times as often in a variety

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[6] Equal Credit Opportunity Act (Reg B) regulations, 12 C.F.R. § 202 (1977) (amended 1985).

[7] See Report of the Citizens Commission on Civil Rights, "Federal Enforcement of the Fair Lending, Equal Credit Opportunity, and Community Reinvestment Laws in the 1980s," in "One Nation, Indivisible: The Civil Rights Challenge for the 1990s" at 235 (Stephen M. Dane 1989).

[8] Fair Housing Act, 42 U.S.C. § 3608, § 808(d).

[9] Dedman, "The Color of Money: Home Mortgage Lending Practices Discriminate Against Blacks," Atlanta Journal Constitution, May 1–4, 1988.

[10] Dedman, "Blacks Turned Down for Home Loans from S&Ls Twice as Often as Whites," Atlanta Journal Constitution, Jan. 22, 1989.

of cities. According to this article, in most cities in most recent years, high-income blacks were rejected for mortgage loans more frequently than low-income whites. Also, these racial disparities appear to have increased substantially over the past fifteen years. Various studies in other cities across the country have reached similar conclusions.

In September 1989 the Boston Federal Reserve Bank released another more sophisticated economic analysis.[11] This study concluded that mortgage originations in black neighborhoods are 24% lower than in white neighborhoods even after taking account of housing stock, levels of income and wealth, and other economic factors which might explain the differential lending rates. The study also showed that Boston mortgage bankers did not make up the gap in lending to minority areas left by the banks and thrifts. Like banks and thrifts, mortgage bankers lent less in black neighborhoods than in comparable white neighborhoods.

These loan discrimination studies were discussed at the hearings. At the May 16, 1989 hearing the OTS testified that its most recent statistics show the gap in mortgage loan rejections between blacks and whites has widened. From the second half of 1988 to the first half of 1989, the rejection rate for white applicants increased from 11% to 13% while the rate for black applicants increased from 23% to 29%.[12] At the initial hearing the OTS reported a simple 2 to 1 ratio between black and white rejections.[13] OTS is the only federal depository institution regulatory agency which prior to 1990 collected data on loan acceptance and rejection rates.[14]

At the October 24, 1989 hearing, Allen Fishbein testified that a 1989 study of 14 major cities by the Center for Community Change found:

> [T]he rate of mortgage lending in minority communities was one-third of what it is in non-minority communities. The rate, meaning the number of loans per 1,000 owner-occupied dwelling units. Moreover, we found that this differential continues regardless of income level, so that in middle income census tracts comparing minority and non-minority, the difference is still one-third lending. . . . I think the reason that we're seeing these differentials, and this a key part of my testimony here today, is that the banking regulatory agencies that have had this responsibility for 20 years just simply lack the will or the expertise to determine whether discrimination is occurring.[15]

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[11] K.L. Bradbury, K.E. Case, and C. Dunham, "Geographic Patterns of Mortgage Lending in Boston, 1982-1987" (1989), reprinted in "New England Economic Review" (Boston Federal Reserve Bank Sept.-Oct. 1989).

[12] Discrimination in Home Mortgage Lending: Oversight Hearing Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. (May 1990) (statement of Jerauld Kluckman, Director, Compliance Programs, OTS) [hereinafter cited as 1990 Hearing].

[13] Jonathan Fiechter, Senior Deputy Director of Supervisory Policy, OTS, 1989 Hearing, at 31.

[14] FIRREA expanded the Home Mortgage Disclosure Act so that all federal depository institution regulatory agencies must collect data on acceptance and rejection rates from the institutions they supervise starting in 1990. In 1977, pursuant to a [National Urban League v. Comptroller of the Currency, 78 F.R.D. 543 (D.D.C. 1976)] case settlement OTS, OCC, and the FDIC were all required to collect loan registry data, including acceptance and rejection data, but the settlement agreements expired in the early 1980's. See Fishbein, "1989 Hearing," at 169-71.

[15] Fishbein, "1989 Hearing," at 153-4 (referring to "S&Ls Shun Lower Income and Minority Neighborhoods" 1989).

Other mortgage lending studies [16] were referred to, and much anecdotal evidence of discrimination [17] was presented, at the hearings. For example, Stephen Dane testified,

> The discrimination in mortgage lending with which I've become familiar is not necessarily malicious or abusive. Indeed, in many cases, it's often unconscious. It, nevertheless, has been found to exist and is generally embodied in some sort of unfounded reluctance to engage in mortgage lending in certain neighborhoods.
>
> I want to distinguish that from discrimination on the basis of the applicants themselves, which I've had very little experience or exposure to, or having found.[18]

Testimony from Bernard Parker, however, illustrated a case of discrimination against an individual rather than a neighborhood. He repeated the comments of a rejected loan applicant who said, "They make me feel like I was wasting my time. Like I wasn't worthy of being a home owner." [19]

C. FIRREA and regulatory agency reports

Section 1211 of the Financial Institutions Reform, Recovery, and Enforcemen Act (FIRREA) expanded the Home Mortgage Disclosure Act (HMDA) [20] so that mortgage bankers, as well as banks, thrifts, and credit unions, will have to disclose acceptance and rejection rates for mortgage loan applicants according to the applicants' race, gender, and income level. Previously, data was collected only by census tract and only for loans approved. Section 1212 of FIRREA additionally provided that starting in June 1990, non-numerical ratings and written evaluations of bank and thrift compliance with the Community Reinvestment Act would be publicly disclosed.

Section 1220 of FIRREA required all the federal depository institution regulatory agencies and HUD to report to Congress on statistical evidence of discrimination and recommendations for action. Few of the reports, except for those from the Federal Reserve and HUD, contained recommendations for remedying mortgage discrimination.

The Federal Reserve reported that studies in Atlanta, Boston, Cleveland, and Detroit have all concluded that areas with predominantly black populations receive fewer (in number and dollar volume) home purchase loans from commercial banks and thrifts than similar predominantly white neighborhoods, even after accounting for differences in neighborhood income levels, number of housing units and other economic variables. The report also described several initiatives which the Federal Financial Institution

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[16] Fishbein, "1989 Hearing," at 183-7 (attachment I to statement).

[17] Stephen M. Dane, Representative, Leadership Conference on Civil Rights, "1989 Hearing," at 217; Shanna Smith, Representative, National Fair Housing Alliance, Inc., "1989 Hearing," at 259, 263-66; Fishbein, "1990 Hearing," at 161-2.

[18] Dane, "1989 Hearing," at 210-11.

[19] Bernard Parker, Co-Chair, Ad Hoc Coalition on Fair Banking Practices in Detroit, "1989 Hearing," at 140.

[20] Home Mortgage Disclosure Act, 12 U.S.C. § 2801 et seq. (1975) (amended 1980, 1983, 1985, 1986, 1987, 1988 and 1989).

Examination Council was reviewing, including mortgage review boards.[21]

HUD's report admitted that it had not been collecting HMDA data properly since 1980 and vowed to correct its data base. HUD committed to several other data collection and analysis efforts, to reviewing its interagency agreements with the financial regulatory agencies, and to monitoring mortgage bankers for fair lending.

OTS reported that black mortgage loan applicants are rejected roughly twice as often as white mortgage loan applicants, but that these statistics "in and of themselves, do not indicate that savings associations are discriminating on a prohibited basis." [22]

D. Additional subcommittee investigations

The Subcommittee made inquiries following each hearing about appropriate legislative and administrative remedies for concerns over mortgage discrimination. Several days after the October 24, 1989 hearing Subcommittee Chairman Dixon sent a letter to each government witness asking about mortgage review boards, testers, consumer compliance examiners, and consumer complaint procedures. The responses collectively showed that each of these ideas could be addressed administratively, so long as the agencies had a commitment to do so.

Following the May 16, 1990 hearing, Subcommittee staff interviewed the special assistant for fair lending at the OCC, OTS, and FDIC. Through these and other investigations the Subcommittee found that at least at some of the regulatory agencies senior management lacks a commitment to fair lending and consumer compliance enforcement. This lack of commitment translated into inadequate consumer compliance examinations, including deficiencies in fair lending examination techniques, and inadequate training of examiners. Notably, the General Accounting Office had identified similar inadequacies in a 1981 study.[23] The Subcommittee, further, found that enforcement of fair lending laws is insufficient once problems have been identified and that insufficient attention is paid to lender policies which have a discriminatory effect.[24]

These same deficiencies had been highlighted at the hearings. For example, Shanna Smith testified:

> In reviewing the compliance handbooks, one would expect that the bank examiners would be able to detect discriminatory lending practices and policies. The Fed's handbook clearly explains what "effects" standards should be applied when conducting a civil rights examination and they identify discriminatory conduct. Although . . . instructions exist, it is obvious to me that they are not employed during the examination procedures.[25]

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[21] Mortgage review boards are forums of both lenders and community group representatives which review rejected loan applications for the purpose of reversing discriminatory decisions and/or locating lenders with more flexible underwriting criteria.

[22] Fiechter, "1989 Hearing," at 31.

[23] Comptroller General of the United States, "Examinations of Financial Institutions Do Not Assure Compliance With Consumer Credit Laws," General Accounting Office, Jan. 2, 1981.

[24] These findings are supported by testimony before the Subcommittee as well. See, e.g., White, "1990 Hearing," at 125, 359-368.

[25] Smith, "1990 Hearing," at 134-5.

E. The special role of HUD

The Department of Housing and Urban Development performs three functions regarding fair lending laws. It has responsibilities under the Home Mortgage Disclosure Act, the National Housing Act, and the Fair Housing Act. Both the Assistant Secretary for Fair Housing and Equal Opportunity and the Assistant Secretary for Housing/Federal Housing Administration Commissioner testified at the Subcommittee's hearings.

First, since 1980 HUD has had responsibility to disclose information on Federal Housing Administration Title I and II activity by mortgagees pursuant to requirements of the HMDA. In 1987 legislation expanded HMDA to include mortgage banking subsidiaries of bank and thrift holding companies and savings and loan service corporations. HUD testified that after passage of this law it began geo-coding census tract information into Federal Housing Administration files for calendar years 1980 through 1988 for all metropolitan statistical areas.[26] Since the 1989 passage of FIRREA, HUD has additionally had responsibility for enforcing compliance with HMDA by mortgage lending institutions, which are not banks, thrifts, or credit unions.

Second, the Federal Housing Administration, particularly the mortgagee review board, has responsibility for monitoring the fair lending compliance of approved mortgagees participating in its programs. Civil rights witnesses at the hearings testified that approved mortgagees which violate fair lending laws should be sanctioned with suspension and debarment under the Housing and Community Development Act.[27]

Third, HUD's Office of Fair Housing and Equal Opportunity has responsibility for enforcing the Fair Housing Act, including its fair lending requirements. Shanna Smith testified that this HUD office has taken steps to work with private fair housing groups to learn how to better recognize lending discrimination, how best to investigate these cases, and what litigation and conciliation strategies work best from experience.[28] In discussing which agency or agencies should have primary responsibility for enforcing fair lending laws, another witness stated:

> Well I think it's HUD by process of elimination more than anything else. All of us have been frustrated with enforcement by HUD as well over the years, but our feeling is that there have been signs at HUD that there is some seriousness about enforcement. . . .[29]

THE LEGISLATION

A. Access to appraisal reports

In hearings witnesses presented evidence that discrimination may occur in the appraisal of a property. Shanna Smith testified:

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[26] C. Austin Fitts, Assistant Secretary for Housing and Federal Housing Administration Commissioner, HUD, "1989 Hearing," at 113.
[27] Smith, "1990 Hearing," at 205–6.
[28] Smith, "1990 Hearing," at 129.
[29] Fishbein, "1990 Hearing," at 107.

> Some loan officers make the appraiser the convenient scapegoat for a loan denial by saying, 'The property did not appraise out and I cannot share the appraisal report with you.' Even though the applicant paid for the report, most lenders will not share it.[30]

Michelle White testified:

> Residents in African-American and Latino sections of Los Angeles often complain that their residences are routinely underappraised. . . . To the extent that the bank regulatory agencies permit financial institutions to rely upon appraisals which contribute to discriminatory lending patterns, these agencies must alter their practices.[31]

And, Allen Fishbein testified:

> Fair housing advocates have long held that under-appraisals are used as a method of rejecting an applicant seeking a mortgage for property located in a minority neighborhood. Unfortunately, most lenders treat the appraisal reports as their own property and will not share the information with the applicant (even though the applicant has paid for it). As a result, applicants do not have access to the information and cannot contest incorrect appraisals.
>
> We support legislation that would guarantee the applicant's right to obtain a copy of his or her appraisal report. The release of this information would go a long way toward discouraging appraisers and lenders from engaging in discriminatory practices in the way in which they estimate property values.[32]

This discrimination may occur when properties in minority neighborhoods are under-appraised by white appraisers who are not familiar with true market prices in such neighborhoods. Witness Barnard Parker testified that this was a problem in Detroit and that such appraisals were used to discourage and disqualify loans.[33]

The legislation, therefore, requires lenders under specified conditions to provide loan applicants with a copy of the appraisal report done on the subject property. By providing the loan applicant with the appraisal, he or she—perhaps with the aid of counsel—will better be able to determine whether a discriminatory appraisal was the reason for the loan denial.

The legislation allows lenders to require that the loan applicant pay for the appraisal before receiving a copy. Loan applicants customarily write a separate check in making a loan application to pay for the appraisal. However, if the appraisal fee were included

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[30] Smith, "1989 Hearing," at 260: "[W]hat we find [in Toledo] . . . is that some policies arbitrarily exclude older neighborhoods which can translate to minority and integrated neighborhoods. For example, . . . many appraisers have policies that discriminate against older neighborhoods."

[31] Michelle White, Housing Specialist, Western Center on Law and Poverty, "1990 Hearing," at 127. See also exchange between Senator Dixon and Robert Hermann at 113-4.

[32] Fishbein, "1990 Hearing," at 148.

[33] Parker, "1989 Hearing," at 148.

in the general loan application fee, lenders would not be allowed to require loan applicants to pay a second time in order to receive the appraisal.

Regulations by the National Credit Union Administration (NCUA)[34] currently require credit unions to make appraisals available without regard to who has paid for the appraisal; this legislation is not intended to modify those NCUA regulations. Neither is the legislation intended to affect the current custom of many lenders routinely to provide copies of appraisal reports.

B. Regulatory agency consumer compliance programs

Both the Federal Reserve and OTS [35] testified that separate consumer compliance examiners were necessary for adequate enforcement of consumer protection laws. The Federal Reserve's written testimony stated:

> The Board believes that expecting a bank examiner to master both the "safety and soundness" and consumer affairs/civil rights aspects of bank examinations is not practical given the existing complexities of both areas which continue to increase. Consequently, the Federal Reserve has developed a separate career path for consumer affairs examiners equivalent to that of commercial examiners at the Reserve Banks. The Board provides special training to these examiners.[36]

Several community group/civil rights witnesses testified that the regulatory agencies have difficulty identifying discrimination. Michelle White explained:

> One of the regulators referred to the fact that something didn't smell bad enough to be investigated further. I think that's the seat of the pants approach that most of the regulators take to this. And what I found in the course of my investigations or my consideration of files while [I was Special Assistant for Civil Rights] at the OCC: those things that smelled badly to me never even occurred to examiners as being offensive.[37]

Inadequate examination techniques and examiner training are partial causes. For example, the agencies do not compare similar loans or loan rejection rates across neighborhoods (to see whether more loans are rejected in minority neighborhoods).

The community group/civil rights witnesses testified in favor of requiring the regulatory agencies to create separate consumer compliance divisions in order to place a higher priority on consumer compliance—including fair lending and Community Reinvestment Act enforcement—within the regulatory agencies. Allen Fishbein testified:

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[34] National Credit Union Administration regulations, 12 C.F.R. 701.31(c)(5) (1989).

[35] Fiechter, "1989 Hearing," at 37. See also exchange between John Bovenzi and Senator Bond, "1989 Hearing," at 125–6.

[36] John W. LaWare, Member, Board of Governors, Federal Reserve System, "1990 Hearing," at 17.

[37] White, "1990 Hearing," at 120. See also Smith, "1990 Hearing," at 129: "And what so disturbs me—still is that the regulators—and bank examiners don't recognize lending discrimination."

> We have long advocated the need for developing a separate specialized examination division for fair lending, CRA, and consumer compliance.
>
> The divisions would have the responsibility for conducting these examinations, using a staff of trained specialist in these areas. Most importantly, these consumer divisions would report directly to the head of the agency. The division would also make recommendations on pending bank expansion applications based on the CRA/fair lending/ and consumer compliance records of the applicant institutions and its subsidiaries. . . . [I]t must be emphasized that unless the chief of this division has the authority to report directly to the agency head . . . the thrust of these separate examinations are likely to [be] buried within the overall examination function.[38]

The Committee, thus, concludes that consumer compliance will receive the consistent enforcement attention that is needed only if one member of senior agency management is responsible for this area. It is also crucial that consumer compliance examiners receive specialized training, that examination techniques are designed properly, and that consumer examinations are conducted on a regular basis. All these factors are necessary to ensure compliance with consumer laws.

The legislation requires all the depository institution regulatory agencies to establish separate consumer compliance programs with specially trained consumer compliance examiners. The head of this program must report directly to the head of the agency. Consumer compliance exams are requires to be conducted either every two years or no less frequently than regular safety and soundness examinations, whichever is less frequent. This legislation does not mandate that the OCC abandon its current random-sampling and targeted approach to compliance examinations.

The current structure of the Federal Reserve System with its Division of Consumer and Community Affairs served as the organizational model for the legislation. However, the legislation requires the agencies only to have separate consumer compliance programs, not separate divisions. Not mandating a separate consumer division provides the regulatory agencies more flexibility in adapting their organizational structure. The head of the consumer program has full authority over the consumer compliance examinations, including their content, procedures, and review, and is required to oversee (but not necessarily supervise) the consumer compliance examiners.

The Committee intends that consumer compliance examiners might also examine safety and soundness operations of small depository institutions, if a regulatory agency finds that significant inefficiencies would otherwise result or a systemic emergency occurs. In other words, examiners who normally conduct safety and soundness exams could be tapped under these conditions to perform consumer compliance examinations, provided that they had received specialized training in consumer compliance. However, the

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[38] Fishbein, "1990 Hearing," at 169-70.

Committee intends that consumer compliance examiners who specialize exclusively in consumer compliance will conduct examinations at large institutions. For example, onsite examinations of depository institutions which are large enough normally to require three or more examiners should include one consumer compliance examiner who specializes exclusively in consumer compliance. This example does not imply that the agencies are required to conduct consumer compliance examinations at the same time as safety and soundness exams.

The legislation also includes certain directives to the agencies in an attempt to guard against second class treatment of those involved in fair lending and consumer compliance examinations. Although some additional personnel may be required at certain regulatory agencies, the legislation emphasizes the need to improve agency structure, priorities, training, and examination techniques rather than adding new personnel. Testimony by Allen Fishbein emphasized this point:

> Well what I'm proposing really shouldn't affect the number of examiners, it's where they're housed in the organizational structure and how high a priority they receive within each of these agencies. And we feel that in those areas it's just not sufficient [now].[39]

The Committee believes that the legislation will allow the regulatory agencies to attend to both safety and soundness and consumer compliance issues.

C. Referrals of suspected discrimination

The Committee also found problems with fair lending enforcement, even after evidence of discrimination was identified. The regulatory agencies showed great reluctance to take strong action against any depository institution found to be discriminating. Testimony from both hearings showed that HUD and the Justice Department would likely take a more appropriate approach to remedying discrimination.

Shanna Smith, representing the National Fair Housing Alliance, testified:

> The deterrents to continued discriminatory behavior has proven to be significant monetary damages: compensatory or punitive or a combination of both. Yet the regulators cannot, do not, or will not seek these remedies or refer cases to HUD or Justice so they can use the full force of the Fair Housing Act to change discriminatory practices.[40]

Consequently, the Alliance recommended:

> Require bank examiners to refer all complaints of mortgage lending, refinancing, home equity or insuring discrimination and any real estate related transaction where discrimination is alleged to both the Department of Justice and HUD's Fair Housing and Equal Opportunity Division. Referrals would include not only all complaints, but any

[39] Fishbein, "1990 Hearing," at 200–201.
[40] Smith, 1990 Hearing," at 137.

> and all information obtained during an examination that might indicate disparate treatment or potential violations of the Fair Housing Act and Equal Credit Opportunity Act.[41]

Testimony by Michelle White also recommended:

> HUD investigators should be given more information on a routine basis. The results of HUD investigations should be routinely given to complainants, so that they can make a more informed determination about the merits of their cases before filing suit.[42]

The legislation, therefore, requires the financial regulatory agencies to refer suspected substantive pattern and practice cases of discrimination under the Equal Credit Opportunity Act to the Justice Department. In addition, the financial regulatory agencies are given the authority to refer any individual suspected cases to the Attorney General. Under current law the agencies refer cases to the Justice Department only "if unable to obtain compliance." [43]

Under current ECOA law individuals may sue for actual and punitive damages, but a 1980 federal district court decision [44] restricts the Justice Department to injunctive relief. The legislation corrects the result of this case by explicitly authorizing the Justice Department to seek actual and punitive damages for ECOA violations. Since the Fair Housing Act (FHA) already provides for punitive damages in amounts significantly larger than those provided in ECOA, this change would not increase a lender's liability in mortgage discrimination cases. It would, however, renew the Justice Department's incentive to bring appropriate ECOA cases. Punitive damages under ECOA are limited to $10,000 for individual cases.[45]

Under current procedures when a regulatory agency finds discrimination, it directs the depository institution to change any discriminatory policies or practices. Victims of discrimination are invited to re-apply for loans, but no indication that the person may have been discriminated against is provided. If a loan applicant has found a different loan at a higher rate, the initial discriminating lender pays only the difference in interest rates. In short, full compensation for damages incurred is not sought; the discriminating institution suffers no penalty. Since HUD is responsible for the Fair Housing Act, it has a bureaucracy trained to conciliate claims and to evaluate damage claims in a more compensatory manner. Thus, the legislation additionally requires the financial regulatory agencies to refer suspected individual cases of mortgage discrimination to HUD and to notify the loan applicant that remedies may be available under the Fair Housing Act.

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[41] Smith, "1990 Hearing," at 140.

[42] White, "1990 Hearing," at 128.

[43] Equal Credit Opportunity Act, 15 U.S.C. § 16913(g), § 706(g).

[44] *U.S.* v. *Beneficial Corp.*, 673 F. supp. 492 (D. N.J. 1980), affirmed without opinion 673 F. 2d (3d Cir. 1981).

[45] Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), § 706(b) (also provides limits on punitive damages in class action cases).

D. Technical amendment to the Home Mortgage Disclosure Act

In FIRREA Congress intended to extend HMDA to all for-profit mortgage lenders, including mortgage bankers. However, depository institutions (and mortgage bankers, because they were included in this definition) less than $10,000,000 in assets are exempt from HMDA. A $10,000,000 asset exemption is inappropriate for mortgage bankers since they normally sell all their loans to the secondary market and are left with few assets.

The legislation, therefore, makes a technical amendment to the Home Mortgage Disclosure Act (HMDA) to address this drafting error from FIRREA. The technical amendment provides for a small-mortgage bankers (and other lending institutions) exemption which is tailored to the mortgage banking industry (and the industries of other lending institutions). It takes non-depository institution mortage lenders out of the $10,000,000 exemption and requires the Federal Reserve, in consultation with HUD, to establish a comparable exemption appropriate to these mortgage lenders whose normal business flow leaves them with relatively few assets.

SECTION-BY-SECTION ANALYSIS

Section 1: Short title

This section provides that the short title of the bill is the "Fair Lending Enforcement Act of 1990."

Section 2: Appraisals

This section amends section 701 of the Equal Credit Opportunity Act to require lenders promptly to provide a loan applicant with a copy of the appraisal report used in connection with applicant's application for a loan secured by residential real estate. The appraisal report is the complete appraisal report signed by the appraiser; it includes all information submitted to the lender by the appraiser for the purpose of determining the value of the residential real estate. The lender may require the applicant to pay for the appraisal. The lender is required to provide the appraisal report whether or not the loan applicant has been granted a mortgage loan.

The applicant must request the appraisal in writing within a reasonable period of time of the loan application. What constitutes a reasonable time would depend on a balancing of factors, such as how long lenders routinely maintain loan files with how long a loan applicant might need to identify and act upon suspected discrimination.

Section 3: Consumer compliance programs

This section adds new section 35 to the Federal Deposit Insurance Act and new section 130 to the Federal Credit Union Act to require each of the federal depository institution regulatory agencies to establish separate consumer compliance programs with specially trained consumer compliance examiners. The head of this program must report directly to the head of the agency.

Consumer compliance examinations are examinations of depository institutions to determine the extent of their compliance with fair lending and all other applicable consumer protection laws. Such examinations could also include selected other public interest

compliance responsibilities. Banks and thrifts must be examined for compliance with the Community Reinvestment Act, but credit unions are not subject to this law. Consumer compliance examinations must be conducted by consumer compliance examiners under the supervision or oversight of the head of the consumer compliance program. Consumer compliance examiners must be specialists in consumer compliance and must have received specialized training in this area. Such examiners, however, may have received training in safety and soundness examination techniques as well.

Such consumer compliance examinations are required to be conducted at least every two years or as frequently as regular on-site safety and soundness examinations, whichever is less frequent. Special safety and soundness examinations, which are conducted because of heightened concern over financial aspects of a depository institution, and brief on-site visitations would not be considered a "regular" examination for purposes of tolling a required consumer examination. Requiring that the consumer compliance examinations be "separate" does not mean that they must be conducted at a different time from safety and soundness examinations. The regulatory agencies may send only one examiner to small depository institutions to conduct both consumer compliance and safety and soundness examinations, but this examiner must have a thorough understanding of the consumer laws and compliance examination procedures.

This section also allows bank and savings and loan holding companies to request the appropriate regulatory agency to do a special consumer compliance examination. The regulatory agencies, however, are not required to perform such examinations.

The head of the consumer compliance program will be responsible for, among other things, developing procedures for consumer compliance examinations, training and supervision or oversight of consumer compliance examiners, responding to consumer complaints, and causing agency personnel to undertake supervisory actions or initiate enforcement proceedings. The head of this program is also responsible for developing career paths for consumer compliance examiners so that examiners who receive this specialized training and conduct these examinations will be treated comparably to examiners who only conduct safety and soundness examinations.

Implementation of the consumer compliance programs must be completed by January 1, 1993.

Section 4: Referrals of discrimination

Referrals to the Justice Department.—Subsection 4(a) amends section 706(g) of ECOA to require the OCC, Federal Reserve, FDIC, OTS, and NCUA to refer suspected pattern and practice cases of violations of the Equal Credit Opportunity Act (ECOA) to the Justice Department. The subsection is intended to mandate referrals of substantive violations and not technical ones. For example, referrals would be required when: (1) the creditor denies loans for which the applicant is otherwise qualified because it discounted part-time income in determining the applicant's creditworthiness, even when that income is shown to be reliable; (2) the creditor denies loans or changes the terms or conditions of loans through

the use of more restrictive credit criteria for minorities or women; (3) the creditor discourages applications from minority applicants by making exceptions from established lending criteria for white applicants but not for minority applicants similarly situated. Referrals would not be required when: (1) the creditor fails to complete processing of applications within 30 days, as required by regulation, if there is no indication that loans are denied or discouraged on a prohibited basis, or that the delays have a particular impact on members of protected categories in such a way as to discourage them from applying for credit; (2) the creditor fails to complete, or to complete properly, adverse action notices as required by regulation; (3) the creditor improperly obtains spousal signatures, where there is no evidence that applicants are denied, or discouraged from applying for, or are given changed terms or conditions on, loans on a prohibited basis by the implementation of this policy; and (4) the creditor fails to obtain monitoring data for mortgage loans, as required, if there is no evidence that applications were discouraged or denied or changed on an illegal basis because of the failure.

Further, subsection 4(a) is not intended to strip these regulatory agencies of their enforcement powers and responsibilities; the agencies should cause depository institutions to change any discriminatory policies identified. Referral of a case does not relieve the regulatory agency of enforcement responsibility; instead, referral provides the Justice Department with the opportunity to intervene or to direct a case. Justice Department action would be most appropriate in egregious cases of discrimination, cases in which the regulatory agencies have not sought proper compensation for victims of discrimination, and cases in which a closer examination by those with greater civil right expertise would be desirable.

In contrast to suspected pattern and practice cases, subsection 4(a) authorizes, but does not require, the regulatory agencies to refer suspected individual cases of discrimination to the Justice Department. Current ECOA law provides that agencies may refer cases to the Justice Department "if unable to obtain compliance."

Justice Department authority to seek damages.—Subsection 4(b) amends section 706(h) of ECOA to clarify that the Justice Department may seek actual and punitive damages in any civil action it brings. Although the ECOA statute provides that the Attorney General may bring a civil action "for such relief as may be appropriate, including injunctive relief," the court in *U.S.* v. *Beneficial Corp.*, 462 F. Supp. 682 (D. N.J. 1980), affirmed without opinion 673 F. 2d (3d Cir. 1981), held that section 706(h) of ECOA, "15 U.S.C. sec. 1691e(h) authorizes the Attorney General to seek a wide range of equitable remedies, but not legal money damages . . ." (462 F. Supp. 688). Subsection 4(b) changes this rule. Punitive damage awards sought by the Justice Department would be subject to the statutory limits provided for in section 706(b) of ECOA.

Referrals to HUD.—Subsection 4(c) amends section 706 of ECOA to require the OCC, Federal Reserve, FDIC, OTS, and NCUA to refer suspected individual cases of mortgage discrimination, i.e. violations of ECOA which also are violations of the Fair Housing Act (FHA), to HUD and to notify the loan applicant that remedies may be available under the FHA.

Like subsection 4(a), this subsection is intended to mandate referrals of substantive violations and not technical ones and is not intended to strip these regulatory agencies of their enforcement powers. The agencies still should cause depository institutions to change any discriminatory policies identified. Referral of a case does not relieve the regulatory agency of enforcement responsibility; instead, referral provides HUD with the opportunity to intervene or to direct a case. HUD action would be most appropriate in egregious cases of discrimination, cases in which the regulatory agencies have not sought proper compensation for victims of discrimination, and cases in which a closer exmination by those with greater civil rights expertise would be desirable.

Section 5: Home Mortgage Disclosure Act

Section 5 amends section 309 of the Home Mortgage Disclosure Act (HMDA) by narrowing the list of institutions eligible to be exempt from the statute for having $10,000,000 or less in assets. The Federal Reserve, in consultation with HUD, is authorized to establish a new exemption for "other lending institutions," which are not banks, thrifts, or credit unions. The new exemption would exempt these lending institutions or mortgage bankers who are comparably small within their industry to banks and thrifts of $10,000,000 or less in assets within the banking and thrift industry.

REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has evaluated the regulatory impact of the bill and concluded that it will result in little or no overall increase in the regulatory burden imposed by the Government. Lenders currently are required to provide various documents and disclosures to loan applicants and some lenders voluntarily provide loan applicants with copies of appraisal reports; consequently, mandating the provision of appraisal reports should result in little or no increase in regulatory burden. Second, the federal depository institution regulatory agencies should be able to staff the required consumer compliance programs by utilizing existing staff; HUD and Justice should be able to handle referrals of additional fair lending cases also by utilizing existing resources. Inasmuch as the technical amendment to the Home Mortgage Disclosure Act merely fulfills the intent of previous statutory changes, no increase in regulatory burden will result.

CHANGES IN EXISTING LAW

The Committee has determined that it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of rule XXVI, paragraph 12, of the Standing Rules of the Senate, with respect to this legislation.

COST OF THE LEGISLATION

The Committee has requested a cost estimate of this legislation under the provisions of section 403 of the Congressional Budget Act of 1974. The cost estimate of the Congressional Budget Office appears below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 13, 1990.

Hon. DONALD W. RIEGLE, Jr.,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed the Fair Lending Enforcement Act of 1990, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs, on July 17, 1990. We expect that implementation of this bill would result in additional costs to the Office of the Comprtoller of the Currency (OCC) and the National Credit Union Administration (NCUA); because additional assessments would be levied on financial institutions to recover these costs, enactment of this bill would have no net impact on the federal budget, nor result in any significant costs to state or local governments. This estimate supersedes the CBO estimate prepared August 1, 1990, to reflect revised report language that clarified the frequency of examinations as well as the organizational structure of the consumer compliance program.

The Fair Lending Enforcement Act of 1990 would require each federal banking agency to establish a separate consumer compliance program to conduct examinations on a regular basis. The Board of Governors of the Federal Reserve, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation either currently operate or are phasing in programs to conduct separate consumer compliance examinations consistent with the bill. As a result, they are not expected to incur any additional costs specifically as a result of enactment of the legislation.

The OCC and NCUA, which regulate national banks and credit unions, do not conduct separate examinations to determine compliance with laws and regulations relating to consumer protection, but rather combine these reviews with examinations for safety and soundness of the financial institutions.

Consistent with the report language, we expect that the OCC would examine financial institutions for compliance with laws affecting consumer-related issues on the same schedule that the OCC currently examines banks for purposes of safety and soundness. According to the OCC, the agency initially would assign existing personnel to a task force to design and develop the new program by reallocating existing personnel, at an estimated cost of $0.3 million. (Because the OCC would have paid salary and benefits for these personnel, these costs would not increase the agency's expenses relative to current law.)

Total expenses to the agency, other than those associated with the task force, would range from $0.2 million to $0.5 million in 1991, and from $0.2 million to $0.9 million annually from 1992 through 1995. The higher costs would occur if OCC hires a consumer compliance director for each of the six district offices. These expenses would be recovered by raising assessments to banks, resulting in no net budgetary impact.

The NCUA examines about 8,500 federally chartered credit unions annually. As part of this process, it also reviews the institu-

tions' compliance with consumer lending practices. While Section 3 of the bill would require special consumer compliance examiners to conduct future examinations, report language would allow these examiners also to examine safety and soundness operations of small institutions. On this basis, CBO expects that the NCUA would provide additional training for approximately 300 full-time equivalent examiners, at an estimated cost of $0.2 million over the 1991–1992 period. Also, CBO anticipates the NCUA would incur annual costs of an estimated $0.4 million for additional reporting and supervisory requirements; the NCUA indicates that the ultimate cost could exceed this amount by $1 million or more annually, depending largely upon the organizational structure developed to implement the bill, which is not certain at this time. The NCUA would charge credit unions for any additional costs resulting from enactment of this legislation, and the net budgetary impact would be negligible in any fiscal year.

The bill would make a number of other changes affecting enforcement of violations of certain consumer-related laws, but these are not expected to have any significant impact on the federal budget.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Maginniss, who can be reached at 226–2860.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer, Director).

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